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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON**

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(The Honorable Robert H. Whaley)

10 UNITED STATES OF AMERICA,)

11 Plaintiff,)

12 vs.)

13 JESSE MCKAY,)

14 Defendant.)

15 _____)

JUSTIN P. LONERGAN

WSBA #55216/ISB No. 11161

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(CJA Mentee)

CASE NO. 2:19-CR-145-RHW

DEFENDANT'S SENTENCING

MEMORANDUM

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TO: WILLIAM B. HYSLOP, United States Attorney and

17 RICHARD R. BARKER, Assistant United States Attorney

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**DEFENDANT'S SENTENCING
MEMORANDUM - 1**

1 COMES NOW, Defendant JESSE McKAY, by and through the undersigned
2 counsel, and submits the following sentencing recommendation and request for a
3 term of confinement within the applicable guidelines range, followed by a properly
4 conditioned term of supervised release.

5 **Background**

6 Jesse McKay is ready to accept the Court's pronouncement of a sentence,
7 having pled guilty and accepted responsibility for assaulting his brother in a
8 manner that caused serious bodily injury. Mr. McKay recognizes he is before the
9 Court for a second time, with the Court having also heard his 1998 homicide case.

10 Mr. McKay has no family support. He has a documented and admitted
11 history of alcohol abuse and mental health concerns that have contributed to his
12 record, along with a similarly admitted history of drug abuse. Mr. McKay has a
13 GED-level education, no clear vocational path, and unremarkable community
14 resources. Mr. McKay is 45 years old, and has spent the better part of the last two
15 decades in federal custody for offenses described in the PSIR.

16 As will be discussed, the defense anticipates the sentencing hearing to
17 present a stark contrast of positions. The Government has proffered it will seek
18 an upward departure and/or variance to the statutory maximum, apparently largely
19 on the grounds of public safety. The defense, on the other hand, proposes a more

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1 nuanced approach that considers the range of relevant §3553 factors.

2 **Argument**

3 Per 18 U.S.C. §3553(a), this Court must consider and balance a wide variety
4 of factors before pronouncing a sentence that is “not greater than necessary.”

5 The nature and circumstances of the offense confirm that it would be
6 inappropriate to deviate or vary upward from the guidelines range. Careful review
7 of the facts and circumstances confirm this case is within the “heartland” of the
8 applicable offense guideline. See USSG Part A, Paragraph 4(b) (there is a “set of
9 typical cases embodying the conduct that each guideline describes”). To be
10 certain, this was an impulsive, rash offense – Mr. McKay’s plea is an
11 acknowledgment that his conduct was unjustified. For whatever reason, though,
12 the environment was such that Mr. McKay felt that his only option to deal with
13 interpersonal conflict was with a violent physical reaction. This was not the
14 culmination of a series of earlier threats or assaults. This was not a planned or
15 orchestrated attack. The harm to C.A.M. involved serious bodily injury, but the
16 evidence does not suggest that the injuries or victim impact are so outside the
17 ordinary range of assaultive conduct that the Court should vary to the 10-year
18 statutory maximum. Thus, this matter is a “heartland” case for which the
19 guidelines range is reasonable and appropriate.

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1 With respect to the history and characteristics of the defendant, the Court
2 should not accept the Government's attempt to re-sentence Mr. McKay for his
3 earlier offenses. As noted in the defense's opposition to the Government's request
4 for a variance or departure, the Government's position reflects policy
5 disagreement, providing a poor basis on which to justify a sentence. Mr. McKay
6 served his time, and his convictions are factored into his criminal history category.
7 In other words, proper application of the guidelines will already cause Mr. McKay
8 to serve more time.

9 Further, the Government does not acknowledge any of the significant
10 mitigating factors that are part of Mr. McKay's history. To do real justice in this
11 case – for society *and the defendant* – requires that we carefully examine why Mr.
12 McKay continues to come back into the criminal justice system. The Government
13 fails to acknowledge certain dynamics and characteristics that may help shed light
14 on why a “heavy confinement” approach is ineffective and, indeed,
15 counterproductive to the statutory considerations. Mr. McKay does not have the
16 benefit of a strong family support network. His educational background is of
17 questionable value. He lacks a feasible vocational path and there is no indication
18 that someone is waiting in the wings to help him find such a path once he has made
19 his amends through this sentence. His home offers little-to-no economic

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1 opportunity... if he is even welcomed back to the reservation.

2 This is not to downplay the seriousness of the situation or to take away Mr.
3 McKay's responsibility for his decisions. Mr. McKay knows he is facing a
4 significant incarceration period and readily understands that the Court may, even
5 within the Guidelines, sentence him in the upper range. Rather, the point is to
6 suggest, for example, that deterrence (§3553(a)(2)(B)) does not equate to 10 years'
7 incarceration. Similarly, protection of the public is important, but Congress
8 clearly envisioned that this type offense does not justify a life sentence. Mr.
9 McKay is young enough that the protection of the public cannot be an overriding
10 concern when there are more deliberate ways to craft a sentence to prevent
11 recidivism.

12 In other words, the Court can adequately balance the §3553(a) factors
13 through an incarceration period within the guidelines range, followed by a lengthy
14 and deliberate period of supervised release. Consider, for example, that Mr.
15 McKay will not recognize the world when he is released from confinement – the
16 last time Mr. McKay saw freedom, the term “social distancing” was not even in
17 existence. Consider the deterrent effect that Mr. McKay has experienced – and
18 will continue to experience – as he is separated from his mother, whose health
19 continues to decline as she experiences increasingly serious health issues.

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1 Mr. McKay proposes that the Court tailor supervised release in such a
2 manner that directs halfway house or other intensive transitional supervision.
3 This approach would be different from that taken in Mr. McKay's earlier federal
4 case. With appropriate supervision, structure, and transitional programming, Mr.
5 McKay will have a realistic opportunity to cement rehabilitative processes that he
6 will have started during his period of incarceration. This will, in turn, better serve
7 the goals of deterrence and protection of the public. See 18 U.S.C. §3553(a).

8 Lastly, the Court should conclude that a sentence outside the guidelines
9 range would cause an "unwarranted sentence disparit[y] among defendants with
10 similar records." 18 U.S.C. §3553(a)(6). As previously briefed in the defense's
11 response to the Government's request for an upward variance and/or departure, the
12 guidelines have already considered the sentencing factors that the Government
13 proffers as grounds to vary upward. The Court would be correct in rejecting the
14 subjectivity of the Government's approach.

15 **Conclusion**

16 Mr. McKay recognizes he is making this recommendation while there are
17 still critical disputes over applicable sentencing factors. The Court's findings will
18 necessarily have an influence on how the Court considers the §3553(a) factors,
19 which the defense will further address through oral argument. Nonetheless, the

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1 issues are sufficiently clear that the defense is confident that its approach – trusting
2 the Court’s discretion to impose a period of incarceration within the guidelines,
3 followed by an appropriately-conditioned period of supervised release – best
4 represents the balance of §3553(a) factors within the particulars of this case.

5 DATED this 20th day of October, 2020.

6 Respectfully Submitted,
7 VIETH LAW OFFICES, CHTD.

8 /s/ Nicolas V. Vieth
9 NICOLAS V. VIETH
Attorney for Defendant – J. McKay

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11 BOHRNSEN STOCKER SMITH
LUCIANI ADAMSON PLLC

12 /s/ Justin P. Lonergan
13 JUSTIN P. LONERGAN
Attorney for Defendant – J. McKay

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CERTIFICATE OF SERVICE

2 I HEREBY CERTIFY that on the 20th day of October 2020, the foregoing
document was electronically filed with the Clerk of the Court using the CM/ECF
3 system which sent a Notice of Electronic Filing to the following person(s):

4 Richard Barker, Assistant United States Attorney

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/s/ Justin P. Lonergan
JUSTIN P. LONERGAN

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